A

Tang Teck Seng & Anor v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05(SH)-312 AND 322–08 OF 2016
ZAWAWI SALLEH, ZAKARIA SAM AND KAMARDIN HASHIM JJCA
28 MARCH 2018

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Drugs and firearms found in apartment during raid — Accused persons were found in apartment — Whether accused persons had care and management over apartment — Whether there were others who had access on apartment — Whether trial judge conducted maximum evaluation of prosecution's case — Whether there was common intention — Whether failure of prosecution to produce visitors' registration book and CCTV recording detrimental — Whether there was failure by prosecution to address as to whom the license holder of the firearms was*

D

E The police conducted a raid at an apartment. Upon finding the grill and door locked, the police forcefully entered the house and inside, they found the appellants. Drugs and firearms were found inside the apartment. The appellants were charged at the High Court for offences: (a) relating to trafficking and possession firearms, an offence under s 34 of the Penal Code; F and (b) of possession of drugs, an offence under the Dangerous Drugs Act 1952 and the Poisons Act 1952. Satisfied that the prosecution had proved a prima facie case, the appellants were called to enter their defence. According to the appellants, they had no knowledge of the incriminating items and there were others who came to the apartment, as evinced by the visitors' registration book. G The trial judge held that the appellants' defence failed to cast any reasonable doubt on the prosecution's case and sentenced the appellants to various terms of imprisonment and a number of strokes of *rotan*. Hence, the present appeal. The issues that arose concerned: (i) the trial judge's failure to conduct a maximum evaluation of the prosecution's case; (ii) the failure of the trial judge H in discussing the element of common intention at the end of the prosecution's case; (iii) failure of the prosecution to produce the visitors' registration book and CCTV recording; and (iv) failure of the prosecution to address as to whom the license holder was.

I

Held, allowing appeals; discharging and acquitting appellants:

(1) Evidence clearly showed that the first appellant was the tenant and in control of the said apartment for seven years prior to the raid. However, the appellants did not have exclusive possession of the said apartment.

There was the presence of a female DNA found. The prosecution ought to have excluded these persons but this was not done and it was fatal to the prosecution's case. No drugs were found near or among the appellants' personal belonging. The appellants also made no incriminating statements (see paras 33, 39–40 & 48).

(2) The High Court judge must explain the basis of his finding that there was common intention. There was a brief discussion at the defence stage but that was not good. The discussion must be at prima facie stage (see para 52).

(3) The non-production of the visitors' registration book and CCTV recording amounted to a withholding or suppression of evidence and if produced, would be unfavourable to the prosecution and consequently, the adverse presumption under s 114(g) of the Evidence Act 1950 must be invoked against the prosecution (see para 59).

(4) According to the appellants, the prosecution had a duty to prove that the appellants had no licence or permit to possess the incriminating exhibits. The court disagreed. Where the facts were within the knowledge of the appellants, the onus probandi. The negative averment, if untrue, could readily be disproved by the production of documents or other evidence within the appellants' possession or control (see paras 62–63).

[Bahasa Malaysia summary

Polis telah menjalankan satu serbuan di sebuah apartmen. Apabila mendapati gril dan pintunya berkunci, polis masuk ke dalam rumah tersebut secara paksa dan di dalamnya, menemukan perayu-perayu. Dadah-dadah dan senjata-senjata api dijumpai di dalam apartmen tersebut. Perayu-perayu dituduh di Mahkamah Tinggi atas kesalahan: (a) berkaitan pengedara dan milikan senjata api, satu kesalahan bawah s 34 Kanun Keseksaan; dan (b) memiliki dadah, satu kesalahan bawah Akta Dadah Berbahaya 1952 dan Akta Racun 1952. Berpuas hati bahawa pendakwaan telah membuktikan kes prima facie, perayu-perayu dipanggil memasukkan pembelaan mereka. Menurut perayu-perayu, mereka tidak mengetahui tentang barang-barang salah dan ada orang lain yang datang ke apartmen tersebut, seperti yang dibuktikan oleh buku pendaftaran pelawat. Hakim bicara berpendapat bahawa pembelaan perayu gagal membangkitkan keraguan munasabah terhadap kes pendakwaan dan menjatuhkan perayu-perayu dengan hukuman penjara pelbagai tempoh dan sebatan rotan. Oleh itu, rayuan ini. Isu yang timbul adalah berkenaan: (i) kegagalan hakim bicara melakukan penilaian maksimum terhadap kes pendakwaan; (ii) kegagalan hakim bicara membincangkan unsur niat bersama pada akhir kes pendakwaan; (iii) kegagalan pendakwaan mengemukakan buku pendaftaran pelawat dan rakaman CCTV; dan (iv) kegagalan pendakwaan menerangkan siapa pemegang lesen senjata-senjata tersebut.

Diputuskan, membenarkan rayuan; melepaskan dan membebaskan perayu:

(1) Keterangan jelas menunjukkan bahawa perayu pertama adalah penyewa dan mempunyai kawalan atas apartmen tersebut selama tujuh tahun sebelum serbuan. Walau bagaimanapun, perayu tidak mempunyai milikan eksklusif apartmen tersebut. Terdapat kewujudan DNA wanita. Pihak pendakwaan seharusnya mengecualikan orang-orang ini tetapi ini tidak dilakukan dan ia telah menjejaskan kes pendakwaan. Tiada dadah dijumpai berhampiran atau antara barang-barang peribadi perayu-perayu. Perayu-perayu juga tidak membuat kenyataan yang menyalahi undang-undang (lihat perenggan 33, 39–40 & 48).

(2) Hakim Mahkamah Tinggi mesti menjelaskan asas penemuannya bahawa ada niat bersama. Terdapat perbincangan ringkas di peringkat pembelaan tetapi ini tidak cukup. Perbincangan mestilah di peringkat prima facie (lihat perenggan 52).

(3) Pengemukaan buku pendaftaran pelawat dan rakaman CCTV yang tidak dibuat adalah penangguhan atau penyembunyian bukti dan jika dikemukakan, akan tidak menguntungkan pendakwaan dan akibatnya, anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 mestilah dikenakan terhadap pendakwaan (lihat perenggan 59).

(4) Menurut perayu, pihak pendakwa mempunyai kewajipan membuktikan bahawa perayu tidak mempunyai lesen atau permit memiliki ekshibit yang dikemukakan. Mahkamah tidak bersetuju. Di mana fakta-fakta itu berada di dalam pengetahuan para perayu, onus probandi terletak padanya. Tafsiran negatif, jika tidak benar, boleh dibantah melalui pengemukaan dokumen atau keterangan lain yang ada dalam milikan atau kawalan perayu (lihat perenggan 62–63).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)
Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632; [1992] 4 CLJ 179, SC (refd)
Collector Of Customs, Madras v D Bhoormul 1974 AIR 859, SC (refd)
Director of Public Prosecutions v Brooks [1974] 2 All ER 840, PC (refd)
Fakhrurrazi Hasan v PP [2015] MLJU 2018; [2017] 2 CLJ 125, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Hari Ram v State of Uttar Pradesh [2004] 3 LRI 523, SC (refd)
Ho Seng Seng v Rex [1951] 1 MLJ 225 (refd)
Ibrahim bin Mohd v PP [2013] 1 MLJ 768, CA (refd)

Lee Chee Meng v PP [1992] 1 MLJ 322; [1992] 1 CLJ 345, SC (refd)
Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528; [2005] 1 CLJ 1043, CA (refd)
Mazlani bin Mansor v PP and other appeals [2014] 2 MLJ 18, CA (refd)
Mohan Singh a/l Lachman Singh v PP [2002] 3 MLJ 291, CA (refd)
Mohd Sharif bin Mohd Sahoji v PP (Criminal Appeal No 05-274–11 of 2012) (unreported), FC (refd)
Okeke Nwabunike Christopher & Anor v Pendakwa Raya [2016] MLJU 1694; [2016] 4 CLJ 407, CA (refd)
Ong Teik Thai v PP [2017] 4 MLJ 421; [2016] 7 CLJ 1, FC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
Pendakwa Raya v Ang Kian Chai [2012] MLJU 158; [2012] 4 MLRA 456, CA (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chong Wei Kian [1990] 3 MLJ 165, HC (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576; [1992] 4 CLJ 2028, HC (refd)
PP v Rosyatimah bte Neza & Anor [1989] 1 MLJ 360, HC (refd)
PP v Tan Ah Ling [1990] 2 CLJ Rep 839, HC (refd)
R v Oliver [1943] 2 All ER 800, CA (refd)
R v Turner [1814–23] All ER Rep 713; (1816) 5 M & S 206; 14 Digest 430, KB (refd)
Reg v Khoo Guan Teik [1957] 1 MLJ 128 (refd)
See Kek Chuan v PP [2013] 6 MLJ 885; [2013] 6 CLJ 98, CA (refd)
Shambu Nath Mehra v The State Of Ajmer 1956 AIR 404, SC (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314, SC (refd)
Suresh v State of Uttar Pradesh AIR 2001 SC 1344, SC (refd)
Williams v Russel (1933) 149 LT 190 (refd)

Legislation referred to

Arms Act 1960 ss 8(a), 36
Criminal Procedure Code s 402B
Dangerous Drugs Act 1952 ss 12(2), (3), 37(b), 39A(1), First Schedule
Evidence Act 1950 ss 106, 114(g)
Firearms (Increased Penalties) Act 1971 ss 2, 7, 7(2)
Penal Code s 34
Poisons Act 1952 s 30(3), (5), First Schedule
Sea Customs Act 1878 [IND] s 167(8)(c)

Navamani (Tea Choo Keng and Rachel Chacko with her) (Tea, Kelvin Kang & Co) for the first appellant.
Hisyam Teh Poh Teik (Muhammad Abd Kadir with him) (Teh Poh Teik & Co) for the second appellant.

Nurulhuda Nuraini bt Mohd Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] Tang Teck Seng ('the first appellant'), Ng Cheng Boon ('the second appellant') and Nik Saiful Azri bin Nik Dir ('OKT3') stood trial in the High Court at Johor Bharu on a plethora of charges.

[2] At the end of the prosecution's case, OKT3 was acquitted and discharged. The first appellant and the second appellant were ordered to enter their defences on all the charges preferred against them. At the end of the trial, they were convicted and sentenced to various terms of imprisonment and a number of strokes of *rotan*.

[3] The charges preferred against the appellants were as follows:

(a) Criminal Trial No 45D-03–08 of 2013:

(i) there are three amended charges preferred. They are:

(1) the first amended charge — for trafficking in firearms, an offence punishable under s 7 of the Firearms (Increased Penalties) Act 1971 ('the FIPA'). The subject matter of the charge involved two revolvers and five hand grenades;

(2) the second amended charge — for having possession two imitation firearms, an offence punishable under s 36 of the Arms Act 1960 ('the AA'); and

(3) the third amended charge — for having in possession of 421 rounds of ammunitions, without valid licence or permit, an offence punishable s 8(a) of the AA;

(ii) all the three charges were premised under s 34 of the Penal Code. The offences were said to have been committed on 21 March 2013 at No 02-06, Blok E6, Jalan Permas 6/18, Bandar Baru Permas, Permas Jaya, Johor Baru ('the said apartment');

(iii) both the appellants were convicted for the said offences. The sentences meted out were as follows:

(1) first amended charge — to life imprisonment (natural life) from the date of arrest and eight strokes of the cane;

(2) second amended charge — six months imprisonment from the date of arrest; and

(3) third amended charge — seven years imprisonment from the date of the arrest;

(b) Criminal Trial No 45A-32–08 of 2013:

(i) there are three amended charges preferred. They are:

(1) the first amended charge — for possession of 34.4g of ketamine, an offence punishable under s 12(3) of the Dangerous Drugs Act 1952 ('the DDA');

(2) the second amended charge — for possession of 4.87g of chlorpheniramine, a poison, an offence punishable under s 30(5) of the Poisons Act 1952; and

(3) the third amended charge — for possession of 5.55g of methamphetamine, an offence punishable under s 39A(1) of the DDA;

(ii) both the appellants were convicted. The sentences meted out were are follows:

(1) the first amended charge — one year imprisonment with effect from the date of arrest;

(2) the second amended charge — six months imprisonment from the date of arrest; and

(3) the third amended charge — two years imprisonment form the date of arrest and three strokes of the *rotan*;

(iii) all the three amended charges were premised on s 34 of the Penal Code and were committed in the said apartment;

(c) Criminal Trial No: 45A-33–08 of 2013

(i) there were two amended charges preferred. They are:

(1) the first amended charge — for possession of 0.91g of ketamine, an offence punishable under s 12(3) of the DDA; and

(2) the second amended charge — for possession of 312.27g of chlorpheniramine, an offence under s 30(3) of the Poisons Act.

Both the charges were premised under s 34 of the Penal Code and were committed in the said apartment;

(ii) the appellants were convicted. The sentences imposed on them were as follows:

A (1) the first amended charge — three months imprisonment from the date of arrest; and

(2) the second amended charge — one year imprisonment from the date of arrest.

B

[4] Being dissatisfied with the impugned decisions, the appellants appealed to this court. Hence these appeals before us.

[5] At the hearing of these appeals, learned counsel informed the court that C they would not pursue the appeal against the decision of the learned trial judge for possession of 312.27g of chlorpheniramine (the second amended charge) in Criminal Trial No 45A-33–08 of 2013.

BRIEF FACTS OF THE CASE

D

Version of the prosecution

[6] The brief facts of the case relevant of these appeals may be stated as E follows:

(a) on 21 March 2013, at about 5am, ASP Sobri bin Baki (SP5) headed a police narcotic team conducted a raid at an apartment at Mon Bisca No 02-06, Block E6, Jalan Permas 6/18, Bandar Baru Permas Jaya, Masai, Johor ('the said apartment');

F

(b) upon arrival at the said apartment, SP5 found that the grill and the door were locked. SP5 then knocked several times on the door of the said apartment and also shouted 'polis' and 'pemeriksaan sedang dijalankan' but there was no respond from the occupants of the said apartment. After G waiting for about two minutes, SP5 instructed Insp Azrul and Cont Ridhwan to cut the grill and then used a 'bazooka' to force open the door of the said apartment;

(c) when the door of the said apartment was opened, SP5 and his police team H rushed inside and found the first appellant standing near the kitchen holding a parang as if he was about to attack the police;

(d) SP5 then shouted at the first appellant 'Polis — sila campakkan parang'. The first appellant man threw the parang towards the hall and SP5 immediately seized the parang and later marked it as 'A' with liquid paper; I

(e) in the hall, SP5 found the second appellant and OKT3. The police conducted a physical inspection on all the accused and found no incriminating items on them. SP5 found, inter alia, a bow and arrow near a deity and marked it as 'B', a white bottle with red cover and a yellow

straw, a glass bottle with a yellow straw marked as 'C'. The witness also found another equipment for taking drug syabu which he marked it as 'D';

(f) in the master bedroom, SP5 found the exhibits as mentioned in the third amended charge of Case No 45D-03–08 of 2013;

(g) in the utility room, SP5 found three hand-grenades, one transparent plastic where the contents were whitish substance suspected to be ketamine, a transparent plastic container containing nine ecstasy pills and in a transparent container containing crystalline substance suspected to be syabu;

(h) on 21 March 2013, at about 11.30pm, ASP Airy Zaidi bin Nordin ('SP19') received from SP5 the exhibits and search lists, namely P38 and P39, respectively, and a handing over of exhibits form between him and SP5 marked as P42;

(i) at about 11.45pm, SP19 instructed L/Corp Suraini ('SP7') to take photograph of all the exhibits. SP19 then kept all the exhibits in a locked room and the key was kept by him;

(j) on 22 March 2013, SP19 instructed ASP Ghazali bin Mohamad ('SP14') to examine the exhibits and to take swab. The swab taken from the exhibits were handed over to SP19 and handing over of exhibits was prepared by SP14 and marked as P59. The exhibits were also kept in lock-room by SP19;

(k) on 23 March 2013, SP19 sent the relevant exhibits to SI Abd Salam bin Jantan ('SP8') for ballistic test;

(l) on 24 March 2013, at about 3.45pm, the first appellant was taken by SP19 to a parking lot at the Mon Bisca Apartment and found a Walther pistol, two magazines with six live bullets each, a black holster with thirty live bullets S&B 117.65 BR, a white glove, an imitation pistol with three plastic bullets, and a yellow cloth wrapping one green hand grenade, an imitation pistol 6121 made in China together with a magazine containing three plastic bullets at the footrest of the drive side, a knife at the side door on the driver side and a *parang*;

(m) on 25 March 2013, SP19 had instructed SP14 to assist him in conducting an examination on the exhibits and to take swabs. SP14 then handed over the FTA card containing the swabs to SP19 together with the other exhibits. The handing over of exhibits form between SP14 and SP19 was tendered as P61;

(n) on 27 March 2013, SP19 sent the relevant exhibits to SP8 for ballistic test;

(o) on 28 March 2013, Insp Nazarul Izwan bin Abdul Manaf ('SP21') sent the drugs exhibits as mentioned in pp 18–19 of the learned trial judge's grounds of judgement for drug analysis and was received by SP1. SP1, in her testimony testified that the drugs which were sent to the Chemistry Department and analysed by her using the methodology for each drug namely ketamine and methamphetamine were confirmed to be dangerous drugs as listed in the First Schedule of the DDA. SP1 also conducted analysis on chlorpheniramine and found it to be poison as listed in the First Schedule of the Poisons Act 1952. The chemist report was tendered as P10;

(p) on 24 April 2013, SP19 sent the relevant exhibits to the Chemistry Department for DNA analysis and was received by SP9. The chemist report was tendered as P51; and

(q) concerning the firearms, bullets and hand grenades sent to SP8 for ballistic test, the result showed that the firearms, bullets and hand grenades were serviceable and could explode. Ballistic report was produced and tendered as P48 and P52, respectively.

Findings at the close of the prosecution's case

[7] After subjecting the evidence presented by the prosecution to a maximum evaluation, the learned trial judge held that the prosecution had established a prima facie case on all the charges preferred against the appellants.

[8] The reasoning of the learned trial judge in holding that he did, may be summarised as follows:

(a) Case No 45D-03–08 of 2013:

(i) the learned trial judge satisfied that the prosecution had succeeded in proving the ingredients of the offence of the joint possession of the two pistol and revolver and the hand grenade in furtherance of the common intention. The learned trial judge accepted the ballistic report which showed that they were serviceable and could explode; and

(ii) concerning the charge for possession of two imitation pistols found in the hall, the learned trial judge was also satisfied that the appellants were in unlawful possession of the two pistols. However, the prosecution failed to adduce evidence that the OKT3 had anything to do with the two imitation pistols;

(b) Case No 45A-32–08 of 2013:

(i) there was evidence to establish that the said apartment was occupied by the appellants and under their 'care and management'. Therefore, the ketamine and methamphetamine discovered in the said apartment were in their actual possession. The learned trial judge also satisfied that the appellants had the requisite knowledge of the impugned drugs and poison found in the said apartment. Accordingly, an offence under s 12(2) of the DDA had been proven against them. Consequently, the appellants were called to enter their defences on all the amended charges. However, the prosecution had failed to prove a prima facie case against OKT3. Consequently, OKT3 acquitted and discharged without his defence being called;

(c) Case No 45A-33–08 of 2013:

(i) concerning the third charge, the learned trial judge was fully satisfied that the appellants had the 'care and management' of the said apartment where the 421 bullets of various calibration were found.

[9] Consequently, the learned trial judge called upon the appellants to enter the defences on all the amended charges.

The version of the defence

[10] The appellants gave evidence by way of witness statements pursuant to s 402B of the Criminal Procedure Code. Their versions may be summarised as follows:

(a) on 21 March 2013, the appellants were in Batam, Indonesia and came back on the same day. The first appellant had no knowledge of the impugned exhibits found in the said apartment. He said that the impugned exhibits could have been put there by his workers or his friends who have access to the said apartment. He had a massage parlour business and he was seldom at the said apartment as he travelled out station quite frequently;

(b) he said that the said apartment was also use as temporary place for his foreign workers to stay while waiting for their visa and permit applications being approved. He said that his sister, named Ting Meng Ting ('SD5'), sometime came to the said apartment two or three times a week. Tan Wing Keat ('SD6'), who at the material time working as a cashier at the first appellant's massage parlour, testified that he had gone to the said apartment and using the spare key which was left by the first appellant at the massage parlour;

(c) the first appellant also gave a set of keys to his friend, Udang, as he often put up at the said apartment. Apart from Udang, others who have also

A come to the said apartment were Boy, Efa and Ah Keat. He said that the management of the said apartment had provided a registration book for visitors' names to be recorded each time they come to the apartment; and

(d) the second appellant confirmed that on 21 March 2013, they went to
B Batam looking for workers for the first appellant's business. The second appellant told the police that he had no knowledge of the impugned exhibits found in the said apartment and the exhibits do not belong to him. When he was at the said apartment, the first appellant's friends namely Boy, Udang and Efa were already there.

C *Findings at the end of the case*

[11] At the end of the entire case, after considering all the evidence adduced in court, the learned trial judge held that the prosecution had succeeded in
D proving its case on all the amended charges beyond reasonable doubt as the appellants had failed to cast any reasonable doubt on the prosecution's case.

[12] The reasoning of the learned trial judge may be summarised as follows:

E (a) the court found no evidence to show that others mentioned by the appellants have access to the said apartment. No documentary evidence were found by the police when they raided the said apartment. The court view the evidence of the appellants as a mere denial;

(b) the court found the evidence of the appellants highly improbable. By
F mentioning names like Udang and Efa does not mean that the defence has dislodged the prosecution's evidence that the appellants have full care and control of the said apartment. The evidence of SD5 and SD6 has no probative value in corroborating the contention that others have access to the said apartment;

G (c) having made a finding on exclusivity of the said apartment, the court found that the prosecution had succeeded in proving its case in all amended charges beyond reasonable doubt and the appellants had failed to cast any reasonable doubt on the prosecution's case; and

H (d) consequently, the court found the appellants guilty on all the amended charges.

THE APPEALS

I **[13]** The main grounds raised by learned counsel for the appellants in assailing the impugned decision are as follows:

(i) common grounds:

(a) the learned trial judge misdirected himself when His Lordship

failed to conduct a maximum evaluation of the prosecution's case and had His Lordship done so, His Lordship would have found that a prima facie case had in fact not been made out; and

(b) the learned trial judge erred when His Lordship failed to discuss the element of common intention at the end of the prosecution's case;

(ii) additional grounds of the second appellant:

(c) failure of the prosecution to produce the visitors' registration book and CCTV recording; and

(d) failure of the prosecution to address the issue as to who the licence holder or whether the appellants have licence(s) for the firearms that formed the subject matter of the charges.

[14] Since both of the appellants raised essentially the same and overlapping grounds of appeal in assailing the impugned decision, we will discuss them together.

GROUND (a)

[15] Learned counsel criticised the learned trial judge's approach in evaluating the evidence adduced by the prosecution. Learned counsel submitted that the gravamen of the offence under s 7 of the FIPA is 'unlawful possession'. It has been defined under s 2 of the FIPA to mean 'possession custody or control of a firearm, or the carrying thereof in contravention of the Arms Act 1960'. In respect of the two amended charges under ss 36 and 8(a) of the AA, the gravamen of the offence is also 'possession'.

[16] Learned counsel posited that in 'possession', there is a necessary mental element of intention, involving a sufficient knowledge of the presence of the two revolvers, six hand grenades and the imitation firearms and the ammunitions (see *Ho Seng Seng v Rex* [1951] 1 MLJ 225).

[17] Learned counsel submitted that there was no sufficient evidence to support the learned trial judge's findings that the appellants had the requisite knowledge. Learned counsel took us through the followings facts in support of the contention that the requisite knowledge had not been proven as against the appellants:

(a) the second appellant was not but a mere visitor, an occupier or a tenant of the said apartment. The keys to the said apartment were not found with the second appellant. The learned trial judge misdirected himself by holding that the appellants had 'care and management' of the said apartment. The finding was anchored on the discovery of documents belonging to the second appellant. The fact that the documents were

found in the drawer of the dressing table does not make the second appellant having 'care and management' of the said apartment. There must be something more to fasten 'care and management' (see *Public Prosecutor v Tan Ah Ling* [1990] 2 CLJ Rep 839; *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576; [1992] 4 CLJ 2028; *Public Prosecutor v Chong Wei Kian* [1990] 3 MLJ 165);

(b) mere presence and proximity cannot fasten knowledge on the appellants. It important to note that all the firearms in the master room were concealed and hidden (see *Mazlani bin Mansor v Public Prosecutor and other appeals* [2014] 2 MLJ 18; *Mohd Sharif bin Mohd Sahoji v Public Prosecutor* (Federal Court Criminal Appeal No 05-274–11 of 2012) (unreported); *Okeke Nwabunike Christopher & Anor v Pendakwa Raya* [2016] MLJU 1694; [2016] 4 CLJ 407); and

(c) the evidence of the investigating officers that the said apartment was accessible to many others is undisputed and not challenged (see *Ibrahim bin Mohd v Public Prosecutor* [2013] 1 MLJ 768; *Pendakwa Raya v Ang Kian Chai* [2012] MLJU 158; [2012] 4 MLRA 456).

[18] In reply, learned deputy public prosecutor ('DPP') vehemently defended the impugned decision. According to the learned DPP, the evidence presented by the prosecution showed that the said apartment was rented to the first appellant by Mok Wee (SP2). This was supported by the tenancy agreement dated 15 February 2006 (exh P12).

[19] When the police team raided the said apartment, the appellants and OKT3 were in the said apartment. SP5 found incriminating exhibits in the hall, master bedroom, utility room and the kitchen. Documents such as passports (exhs P27–P28), a JPN slip (exh P29), a birth certificate (exh P30), an official receipt from Columbia Asia Hospital (exh P32(A–C)); a letter form Messrs KP & Co (exh P33) and a CD/DVD Columbia Asia Cheras, Radiology Department (exh P34), all in the name of the second appellant, were found in the said apartment. Therefore, it could reasonably be inferred that the second appellant had 'care and management' of the said apartment.

[20] Learned DPP submitted that there was no doubt the first appellant was the tenant of the said apartment. Therefore, the first appellant, had the 'care and management' of the said apartment.

[21] Concerning ketamine, methamphetamine and poison, they were found in the apartment occupied by the first and second appellants. Thus, the first and second appellants had the actual possession of the impugned drugs.

[22] Learned DPP emphasised that the findings of facts above by the learned

trial judge is entitled to great respect and should not be disturbed by this court because the learned trial judge has the advantage of hearing the witnesses and observing the demeanour and manner of testifying. In the absence of any showing that substantial or relevant facts bearing on the elements of the crime have been misapplied or overlooked by the learned trial judge, this court can only accord full credence to such factual assessment of the learned trial judge.

Our findings on issue (a)

[23] Section 7(2) of the FIPA states:

> (2) Any person proved to be in *unlawful possession* of more than two firearm shall be presumed to be trafficking in firearms; and section 2 of FIPA defined 'unlawful possession' to mean 'possession, custody or control of a firearm, or the carries thereof, in contravention of the Arms Act 1960'.

[24] It is trite that the word 'possession' includes actual as well as constructive possession, and also sole and as well as joint possession. A person who has direct physical control of something on or around his person is in actual possession of it. A person who is not in actual possession, but who has knowledge of the presence of something and has the authority or right to maintain control of it either alone or together with someone else, is in constructive possession of it. If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

[25] In *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840, possession is characterised as knowingly having the prohibited substance in one's physical custody or under one's physical control. Thus, in order to prove possession, the prosecution must prove that there is first, physical control over the prohibited substance and second, knowledge of the existence of the thing itself, that is the existence of the prohibited substance but not the nature of it (see *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401).

[26] Guilty knowledge, unless expressed, must be proven circumstantially. Thus, knowledge may be inferred from the fact of possession or from surrounding circumstances or from both (see *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576).

[27] Learned counsel for the appellants in submitting that the impugned decision is unreasonable and cannot be supported by the evidence, noted that although the learned trial judge found the appellants were in the said apartment at the time the police team barged in, there was no evidence to establish that the appellants being seen actually placing the incriminating

exhibits in various places in the said apartment. There was also no evidence to establish that the appellants knew actually or inferentially that the incriminating exhibits which formed the subject matter of the charges were in the said apartment. Learned counsel further submitted that the learned trial judge had no basis in finding as a matter of fact that the appellants were guilty of possession of the incriminating exhibits because the prosecution had failed to establish the appellants had the requisite mens rea (knowledge).

[28] We agreed with the submission of learned counsel for the second appellant that the learned trial judge erred in holding that the second appellant had 'care and management' of the said apartment. In our view, mere fact that the personal documents referred to in items 21–22 of the search list were found in the said apartment alone, without something more, did not afford sufficient ground to attack the presumption under s 37(b) of the DDA 1952.

[29] There is of course ample authority for such proposition. In *Public Prosecutor v Tan Ah Ling*, although the electricity and telephone bills were in the name of the accused, the court held that they did not afford sufficient grounds for the operation of the said presumption. In *Public Prosecutor v Chong Wei Kian*, evidence was presented that at the time of arrest, the accused had with him, the keys to the room in which the drugs were found and in the said room the police recovered a passport and a bank book belonging to him yet the court was of the opinion that it was insufficient to trigger the presumption.

[30] Further, there is ample material on record capable of pointing towards a conclusion that the second appellant was a mere visitor to the said apartment and he has no control over the premises. SP19, one of the investigating officers, testified that the second appellant was only a visitor to the said apartment. In his evidence at p 275 AR Vol 2A, SP19 said:

> Saya ada siasat penama kedua Ng Chong Boon. Dipercayai Ng Chong Boon menumpang tidur di rumah Tang Teck Seng.

[31] It is pertinent to note that the keys to the said apartment were not found with the second appellant.

[32] In our view, the learned trial judge fell into serious error in holding that the second appellant had 'care and management' of the said apartment.

[33] We, however, agreed in part with the conclusion of the learned trial judge that the first appellant indeed had 'care and management' of the said apartment. There is not a scintilla of evidence to show that the first appellant was merely a visitor. The evidence presented by the prosecution clearly showed that the first appellant was the tenant and in control of the said apartment since

15 February 2006 for a period of seven years prior to the raid. We entertained no doubt that the first appellant had 'care and management' of the said apartment.

[34] In *Public Prosecutor v Rosyatimah bte Neza & Anor* [1989] 1 MLJ 360, the presumption under s 37(b) of the DDA 1952 was invoked as it was shown that the first accused was the tenant of the room from which the cannabis was recovered and to which room she alone had the key.

[35] In our view, the learned trial judge had correctly invoked the aforesaid presumption against the first appellant.

EXCLUSIVE POSSESSION

[36] Constructive possession exists when the evidence shows that the accused has knowledge of the presence of the controlled and/or prohibited substance and has the authority or right to maintain control of it and constructive possession may be proved by inferences.

[37] Although the doctrine of constructive possession evolved in drug-possession cases, we apply the same principles in firearms cases.

[38] The existence of constructive possession turns on the peculiar facts of each case and may be inferred when the drugs or firearms are found in premises in an accused's exclusive possession.

[39] In these instant appeals, in our view, the appellants did not have exclusive possession of the said apartment. This aspect has been put to the prosecution through SP19. In re-examination, SP19 stated:

> Saya setuju dengan cadangan peguambela OKT1 and OKT2 terdapat nama, orang yang keluar masuk ke premis unit 02-06 kerana itu kediaman dan penghuni di situ mungkin boleh bawa sesiapa ke dalam rumah tersebut.

[40] Further, there is the presence of the DNA of 'Female 1' on the towel and the pillow case found in the said apartment. The prosecution ought to have excluded these persons but this was not done and it is fatal to the prosecution's case.

[41] The name of Efa and Nazir were given by the appellants to the police. SP5, one of the investigating officers, stated that he knew Efa as he had met her for drinks at various outlets yet no attempt was made by the prosecution to exclude her as having access to the said apartment. Following the cross-examination of SP5 and SP19, persons by the name of Udang @ Redzuan

A and Boy were mentioned but they had not been excluded as persons having access to the said apartment.

[42] The prosecution also had failed to exclude the possibility of the following persons having access to the said apartment:

B

(a) SP5 testified in cross-examination that the apartment was possibly accessible to other persons; and

(b) in exh P42 (Borang Serah Menyerah Barang Kes Rampas) prepared by SP5 at the said apartment on 21 March 2013 and handed over to SP19, the driving licence of one Ramadhan bin Nawawi was included. He has not been excluded by the prosecution as a person having access to the said apartment.

C

D **[43]** We have studied cases decided by our courts on drug possession in non-exclusive situations, inter alia, the following:

(a) *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16;

(b) *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1;

E

(c) *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137;

(d) *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314;

(e) *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322; [1992] 1 CLJ 345;

F

(f) *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137;

(g) *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632; [1992] 4 CLJ 179; and

(h) *Mohan Singh a/l Lachman Singh v Public Prosecutor* [2002] 3 MLJ 291.

G

[44] Our courts have consistently held that possession must be exclusive. The term 'exclusive possession' is not defined in the DDA 1952. Nevertheless, the courts have elucidated 'exclusive possession' as follows:

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> Thus, to sum up, the common usage, plain, natural and ordinary meaning of 'exclusive' is 'excluding or to exclude all others; not shared or divided'. In the context of drug possession, 'exclusive possession' can be construed to mean that the place where the drugs are found must be exclusive to the accused. However, possession of the drugs need not be exclusive. Possession may be joint, that is, two or more persons may jointly have possession of the contraband, exercising custody and control over it. In that case, each of these persons is considered to be in possession of that contraband (per Mohd Zawawi Salleh JC (as he then was) in *Public Prosecutor v Tukiman bin Demin* [2008] 4 MLJ 79).

I

[45] Thus, exclusivity must be proved by the prosecution. It is, therefore,

incumbent on the prosecution to discharge this burden, and if here are gaps, the prosecution must close the gaps. It not the defence duty to supplement the case for the prosecution.

[46] In *Fakhrurrazi Hasan v Public Prosecutor* [2015] MLJU 2018; [2017] 2 CLJ 125, the facts are these: the accused was carrying a paper bag and in the paper bag was a towel and under the towel was a package wrapped in newspaper. In it was the prescribed drugs, that is three packets containing 2,681g of cannabis. On these facts, the Federal Court did not find knowledge. The Federal Court invoked presumption to find knowledge. His Lordship Ahmad Maarop FCJ (now CJM) said:

> When someone is caught carrying a bag containing package of dangerous drugs, the element of accessibility to the thing and the opportunity to inspect is invariably established because of his proximity to the bag and the packages. However, in the absence of additional evidence, for example of him taking a peek at the drugs, it does not necessarily mean that he must have knowledge of the drugs, unless there is a presumption in the law to warrant knowledge to be presumed, and indeed in our view, this is where the presumption under s 37(d) of the Act may be called into play to presume knowledge of the nature of the thing in the bag.

PROXIMITY

[47] Concerning proximity to the contraband, we are of the view, though pertinent, is not enough to show control and dominion. There are several nonexclusive factors to be considered in determining whether an accused possessed contraband discovered in jointly occupied premises:

(a) incriminating statement made by a person;

(b) incriminating actions of the person upon the police's discovery of a controlled substance among or near to the persons' personal belonging;

(c) the person's fingerprints on the packages containing the controlled substance; and

(d) any other circumstances linking the possession to the controlled substance.

[48] In these instant appeals, it is pertinent to note that no drugs were found near or among the appellants' personal belonging. And the appellants made no incriminating statements.

[49] We noted competing considerations at play in the constructive possession jurisprudence. Conviction for possession of drugs should be possible under the law, even though the accused is not caught 'red-handed', but

innocent bystanders in the wrong place at the wrong time must be protected from a conviction.

ISSUE (b)

[50] In all the charges preferred against the appellants they were premised on the element of common intention. It is an essential ingredient of the charge and the learned trial judge ought to have discussed the same. His Lordship did not do so.

[51] The prima facie ruling appears from pp 315–319 AR Vol 2A. The written grounds of His Lordship up to the prima facie ruling can be found from pp 53–59 AR Vol 1. In the written grounds at p 57 AR Vol 1 there was a statement to the effect:

> The prosecution has succeeded in proving the joint possession of the 2 pistol revolver and the hand-grenade in furtherance of the common intention.

[52] We agreed with the submission of learned counsel for the appellants that His Lordship must explain the basis of his finding that there was common intention. There was a brief discussion at the defence stage but that, with respect, is no good. The discussion must be at the prima facie stage.

[53] The law relating to common intention is set out, inter alia, in two leading Indian authorities — *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344 and *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523. The relevant passages of these cases are reproduced by the Court of Appeal in *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528 at p 542; [2005] 1 CLJ 1043 at pp 1064–1065:

> To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s 34. In *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, Sethi J speaking for himself and Agrawal J said:
>
> > Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. *Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a*

common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. (Emphasis added.)

In *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arijit Pasayat J said:

> Under the provisions of s 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s 34, when an accused is convicted under s 302 read with s 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch Pulla Reddy & Ors v State of Andhra Pradesh* AIR [1993] SC 1899, s 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34 it is not necessary to show some overt act on the part of the accused.

[54] In *Ong Teik Thai v Public Prosecutor* [2017] 4 MLJ 421; [2016] 7 CLJ 1, the learned trial judge made a finding that the 'accused person and his joint involvement with others in the attack on the deceased at the scene …' without identifying the acts of participation by the accused and this was held by the Federal Court to be erroneous.

[55] This is what Ahmad Maarop FCJ (now CJM) said at p 438 (MLJ); p 17 (CLJ) of the case:

> Additionally, in the second part of his finding, which is the continuation of the first part of the finding, the learned judge said 'and his joint involvement with the others in the attack on the deceased at the scene, the intention of which was clearly to cause the death of the deceased'. According to the learned judge, this finding was made by him after 'having made the maximum evaluation of the evidence of SP5, SP6 and SP8 in their totality'. What did he mean by that? What did he mean by 'his joint involvement with the others in the attack on the deceased?'. He did not make specific finding as to what appellant did or did not do in 'his joint involvement'. In his evidence in court SP6 did identify the appellant as one the attackers. However, as we demonstrated, there were contradictions within SP6's own evidence, and contradictions between SP6's and SP8's evidence which raise serious doubt on the identification of the appellant as one of the attackers of the deceased or as one of the culpable participants of the offence. As we have said the learned trial judge did not direct his mind to those contradictions in considering the issue of the identification of the appellant. There is also nothing to show that he had addressed his mind to these contradictions in considering what was the act done by the appellant in participating in the criminal act actually committed to make him liable by the operation of s 34 of the Penal Code. Indeed there is no finding made by him on the specific act done by the appellant in furtherance of the common intention which is

A crucial in a case such as this where reliance is placed on s 34 of the Penal Code.

GROUND (c): FAILURE TO PRODUCE VISITORS' REGISTRATION BOOK AND CCTV RECORDING

B **[56]** Learned counsel for the second appellant submitted that Puan Junaidah bt Johari (SD4), the clerk from the Mon Bisca Management Unit had testified that the visitors' registration book was taken by a plainclothes policeman. The second policeman who came asking for the book was one Saiful whom she saw in court. However, the prosecution denied possession of the book.

C

[57] Learned counsel for the appellant submitted had the visitors' registration book and the CCTV recording been tendered in court it would revealed the persons who had entered the said apartment and would be able to exclude Udang, Boy, Efa, Nazir and all the first appellant's workers.

D

[58] In our view, there is force in the submission. The visitors' registration book and the CCTV recording could clear the doubt whether others have access to the said apartment. Had the visitors' registration book and CCTV recording been produced, the learned trial judge would be in better position to verify to prosecution's case.

E

[59] The non-production of the visitors' registration book and CCTV recording, in our view, amounted to a withholding or suppression of evidence and if was produced, it would be unfavourable to the prosecution and consequently, the adverse presumption under s 114(g) of the Evidence Act 1950 must be invoked against the prosecution (see *See Kek Chuan v Public Prosecutor* [2013] 6 MLJ 885; [2013] 6 CLJ 98).

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G GROUND (d): LICENCE/PERMIT

[60] Learned counsel for the first appellant submitted that at no time has the prosecution established or attempted to establish 'unlawful possession', an essential ingredient of the offence. SP19 in cross-examination stated:

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> saya tidak pernah merujuk kepada bahagian pelesenan sama ada senjata api ini telah dilesenkan. Ya, di dalam percakapan amaran OKT1 dan OKT2 tidak pernah diminta untuk kemukakan sebarang lesen senjata api.

I **[61]** Learned counsel vehemently argued that the most vital ingredient of the charge viz 'unlawful possession' has not been proven by the prosecution.

[62] Learned counsel argued that the essence of the crime under s 7(2) of the FIPA is primarily the appellants lack of licence or permit to possess the firearm,

as possession itself is not prohibited by law. The prosecution has duty to prove that the appellants have no licence or permit to possess the incriminating exhibits.

[63] We disagreed with the submission. In our view, where the facts are within the knowledge of the appellants, the onus probandi rests upon them. The negative averment, if untrue, could readily be disproved by the production of documents or other evidence within the appellant's possession or control. For example, where a charge is made that the accused carried on a certain business without a licence, the fact that he has a licence is peculiarly within his knowledge and he must established that fact or suffer conviction (see s 106 of the Evidence Act 1950, *Reg v Khoo Guan Teik* [1957] 1 MLJ 128 (HC)).

[64] In *Shambu Nath Mehra v The State Of Ajmer* 1956 AIR 404 it was held as follows:

> Section 106 is an exception to section 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre- eminently or exceptionally within his knowledge.

[65] In *Collector Of Customs, Madras v D Bhoormul* 1974 AIR 859, proceedings were initiated under s 167(8)(c) of the Sea Customs Act 1878 for confiscation of contraband or smuggled goods and it was observed:

> ... Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the accused, it is not obliged to prove them as part of its primary burden. (para 31)
>
> ... On the principle underlying s 106 Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty.

[66] In *R v Oliver* [1943] 2 All ER 800, the accused was charged with having sold sugar as a whole-sale seller without the necessary licence. It was held that whether the accused had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him. It was further held that in the circumstances of the case the prosecution was under no necessity to give prima facie evidence of non-existence of a licence. In this case reference is made to some earlier decisions and it will be useful to notice the

same. In *R v Turner* [1814–23] All ER Rep 713; (1816) 5 M & S 206; 14 Digest 430, the learned judge observed as follows:

> I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative.

[67] In *Williams v Russel* (1933) 149 LT 190, the learned judge held as follows:

> On the principle laid down in *R v Turner* and numerous other cases where it is an offence to do an act without lawful authority, the person who sets up the lawful authority must prove it and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute.

CONCLUSION

[68] In the result, we allowed the appeal by both appellants. The convictions and sentences passed by the High Court were set aside. The appellants were acquitted and discharged. So ordered.

Appeals allowed; appellants discharged and acquitted.

Reported by Afiq Mohamad Noor